

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

JEANNETTE MILLER	)	CIVIL NO. 04-00441 BMK
	)	(Admiralty)
Plaintiff,	)	
	)	AFFIDAVIT OF
vs.	)	MARK S. HAMILTON
	)	
MAUI OCEAN ACTIVITIES, INC.	)	
("MOA"), THEODORE C. KING,	)	
BETH D. KING, <i>In Personam</i> and	)	
MOA VESSEL, <i>In Rem</i> ,	)	
	)	
Defendants.	)	
_____	)	

**AFFIDAVIT OF MARK S. HAMILTON, ESQ.**

STATE OF HAWAII	)	
	)	SS.
CITY AND COUNTY OF HAWAII	)	

MARK S. HAMILTON, being first duly sworn on oath, deposes and states that:

1. I am an attorney licensed to practice law before all courts in the State of Hawaii and am one of the attorneys representing Defendants MAUI OCEAN ACTIVITIES, INC., THEODORE C. KING, BETH D. KING, and MOA VESSEL ("Defendants") in this case.

2. I have personal knowledge of the matters set forth herein and am

competent to testify thereto in a court of law.

3. Plaintiff JEANETTE MILLER (“Plaintiff”) was injured on a boat ramp owned and maintained by the State of Hawaii (the “State”).

4. Plaintiff filed suit against the State in state court alleging the State’s “negligence was a proximate cause of Plaintiff’s injury.” Miller v. State of Hawaii, Civil No. 05-1-0139K.

5. Failure to join an indispensable party under Fed. R. Civ. P. 19 can be raised at any time, either by motion to dismiss or for the first time at trial. *See* Fed. R. Civ. P 12 (h)(2) & 21.

6. The State’s absence in this case makes it impossible to assess the percentage or degree of the State’s negligence, if any, and any decision without a determination of the contributory negligence of the State prejudices Defendants. A decision in federal court could “fix” Defendants’ percentage of liability and bind the State without the State having had an opportunity to affect that determination, thus, the State would be prejudiced.

7. Trial in Civil No. 04-00441 BMK is scheduled for October 17, 2006.

8. A hearing scheduled for twenty-eight days or more after service as set forth in Local Rule 7.2 may not allow for a hearing before trial.

9. A determination by the court that the State is a necessary and

indispensable party and cannot be joined would require the court to dismiss the case and a trial would not be needed.

FURTHER AFFIANT SAYETH NAUGHT.

  
\_\_\_\_\_  
MARK S. HAMILTON

Subscribed and sworn to before me  
this 7th day of September, 2006.

  
\_\_\_\_\_  
Notary Public, State of Hawaii

Aulis Ann K. Hoo  
\_\_\_\_\_  
Printed Name of Notary

My commission expires: January 9, 2011

L.S.